SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1968

GEORGE F. COLLINS, JR., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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On May 1, 1959, petitioner transferred 26,592 shares of Liberty Glass Company common stock to his wife, Beverley, as part of a property settlement agreement which was incorporated in their Oklahoma divorce decree.[1] The Commissioner determined that the transfer to Beverley was a taxable exchange and,

[1] These shares represented one fifth of a controlling bloc of 132,960 shares of Liberty stock he owned, which largely represented shares petitioner had inherited after his marriage to Beverley.

accordingly, issued a notice of deficiency increasing 1959 taxable income by $440,092.40.[2] Petitioner contested this determination in the Tax Court, both with respect to the existence of a taxable transfer and the valuation placed on the Liberty stock.

The Tax Court held that since title to the stock was not held jointly, and Oklahoma is not a community property state, the transfer of Liberty stock to Beverley was not a division of jointly owned property, but was a disposition giving rise to a taxable gain under Section 1002 of the Internal Revenue Code of 1954. See *United States* v. *Davis*, 370 U.S. 65. The Tax Court determined the fair market value of the 26,592 shares to be $531,840.[3] The Tenth Circuit affirmed, on the authority of *United States* v. *Davis*, *supra*, and *Pulliam* v. *Commissioner*, 329 F. 2d 97 (C.A. 10).

The decision below is correct. There is no conflict in decisions or any other reason warranting further review.

Whether the law of a particular state actually accords a wife rights akin to co-ownership in her husband's property depends on the legal rights the wife has in the transferred property during the marriage. As Davis indicates (370 U.S. at 70-71), these questions include (1) whether the wife had a vested in-

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[2] This figure was obtained by subtracting petitioner's basis in the shares transferred, $19,815.19, from their fair market value of $900,000 and reducing the remainder by 50 per cent as a long-term capital gain.

[3] Neither petitioner nor the Commissioner sought review of this finding in the Tenth Circuit.

terest in the property, (2) whether the husband could convey the property without her consent, (3) whether the wife owned a descendible property interest, and (4) whether the property division could be based, at least partially, on the wife's need, a factor alien to the notion that pre-existing property rights are being divided.

Petitioner does not contest the Tenth Circuit's use of the standards used in *Davis* for determining state law. The question which petitioner does raise—whether the Tenth Circuit properly construed Oklahoma law (Pet. 9-10)—is a matter of local law, which this Court has no occasion to review. *E.g.*, *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596; *Second National Bank of New Haven, Executor* v. *United States*, 387 U.S. 456, 462.

In no event did the Tenth Circuit misapprehend Oklahoma law. Oklahoma's highest court has held that the statute upon which petitioner relies for his contention that a true division of property occurred here, Section 1278, Title 12, of the Oklahoma Statutes (Pet. 3), does not vest in a wife any interest in property jointly acquired during marriage prior to divorce. *Jones* v. *Farris*, 180 Okla. 341, 69 P. 2d 344.[4] Petitioner, without Beverley's consent, could have conveyed

[4] The statute gives the wife an absolute right to property owned by her prior to marriage or acquired by her alone during marriage (Pet. 3). Such property is not involved here; the stock was inherited by the husband alone prior to the marriage (Pet. 35). As to the increment in value of separate property which accrues during marriage, the statute gives the wife an equitable right to receive so much thereof as is attributable to her efforts.

the stock to anyone at any time because the title to the property was exclusively in his own name. 16 Okla. Stat. Ann. Sec. 13. Nor did Beverley own a descendible property interest in either petitioner's separate property or the jointly acquired property of the marriage. 84 Okla. Stat. Ann. Sec. 213; *Evans* v. *Evans*, 301 P. 2d 232 (Okla.); *Jones* v. *Farris*, *supra*. Finally, the Oklahoma Supreme Court has recently held that factors such as the financial status of the parties, and the custody and maintenance of children are proper considerations for a court in dividing any jointly acquired property of the marriage. *Shook* v. *Shook*, 352 P. 2d 376, and *Roberts* v. *Roberts*, 357 P. 2d 980.[5]

Because Beverley's contributions during the marriage to the enhancement of her husband's business and, hence, the appreciation of its stock, were limited to the normal social activities of a business executive's wife, under Oklahoma law they were not the tangible and substantial contributions necessary to earn her a share in her husband's separate property. See, *e.g.*, *Moyers* v. *Moyers*, 372 P. 2d 844 (Okla.); *Raines* v. *Gifford*, 370 P. 2d 1 (Okla.); and *Haynes* v. *Haynes*,

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[5] *Moyers* v. *Moyers*, 372 P. 2d 844 (Okla.), cited by petitioner (Pet. 8), is not to the contrary. That case holds only that in a judicial division of jointly-acquired property the court should look to the respective roles of the spouses insofar as their conduct and efforts contribute to the property's value. This is a recognition that pre-existing ownership rights are subject to later revision as the evidence of the spouses' contributions to the property's value may indicate. Nothing in this record, however, allows any addition to Beverley's interest on such a theory.

197 Okla. 221, 169 P. 2d 563.[6] Since petitioner transferred only one-fifth of his Liberty stock to Beverley, the transfer would not qualify for a tax free division of property even in a community property state, because it is only the equal division of property which is so treated. Anything less than an equal division is not a division at all, but a sale. *E.g.*, *Rouse* v. *Commissioner*, 6 T.C. 908, affirmed, 159 F. 2d 706 (C.A. 5); *Johnson* v. *United States*, 135 F. 2d 125 (C.A. 9).

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1968

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[6] There is no reason to infer (see Pet. 11) that petitioner's Oklahoma state tax controversy, allegedly on appeal to the Oklahoma Supreme Court, would be resolved on the basis of a construction of local law at odds with that here. The well-setlted Oklahoma law is all to the contrary. There was therefore no occasion for the court of appeals to defer its decision until the State court in that case had determined Oklahoma law.

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